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No. 84-1556

IN THE

Supreme Court of the United States

Spring Term 1985

DURHAM HOSIERY MILLS, INC. and
GEORGE A. CRALLE, Individually,
JOHN P. BARNETT, Individually,
H. E. SCHOENHUT, JR., W. K.
BIGELOW, H. E. RODENHIZER,
W. C. SPANN,

Petitioners

vs.

ROBERT C. WHITE,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

I. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR IN AFFIRMING THE JURY'S VERDICT (AND A JUDGMENT ENTERED THEREON) FINDING THAT PETITIONERS HAD ENGAGED IN A SCHEME OR ARTIFICE TO DEFRAUD RESPONDENT OF HIS DISSENTER'S RIGHTS?

II. DID THE COURTS BELOW ERR IN UPHOLDING THE JURY VERDICT WHERE (1) RESPONDENT'S APPRAISAL RIGHT IS NOT THE EXCLUSIVE REMEDY AND (2) THE RESULTS REACHED BY THE COURTS BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *SANTA FE INDUSTRIES, INC. v. GREEN,* 430 U.S. 462, 97 S.CT. 1292, 51 L.ED.2D 480 (1977).

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, ROBERT C. WHITE (hereinafter "Respondent" or "White"), respectfully prays that the Petition for Writ of Certiorari filed by Petitioners, DURHAM HOSIERY MILLS, INC. ("Durham Hosiery"), GEORGE A. CRALLE ("Cralle"), JOHN P. BARNETT ("Barnett"), H. E. SCHOENHUT, JR. ("Schoenhut"), W. K. BIGELOW, H. E. RODENHIZER and W. C. SPANN (hereinafter collectively referred to as "Petitioners"), be denied. In

support of his position Respondent respectfully shows that:

OPINION BELOW

A copy of the decision of the Fourth Circuit Court of Appeals is this case, *Robert C. White v. Durham Hosiery Mills, Inc., et al.*, 735 F.2d 1072 (4th Cir. Jan. 7, 1985) (table), is attached as Exhibit A to the Petition. A copy of the Fourth Circuit's panel decision denying rehearing, *Robert C. White v. Durham Hosiery Mills, Inc., et al.*, No. 83-2023 (4th Cir. Feb. 1, 1985), is attached as Exhibit C to the Petition.

JURISDICTION

The Petition for Writ for Certiorari should be denied because (1) the decision rendered by the Fourth Circuit in this matter does not conflict with the decision of another federal court of appeals on the same matter; (2) the Fourth Circuit's decision does not conflict with that rendered by a state court of last resort; and (3) neither the Fourth Circuit's decision nor the district court judgment which it upheld represents a departure from the accepted and usual course of judicial proceedings. *See* SUP. CT. R. 17.1(a).

STATUTES INVOLVED

The text of three statutes, 17 C.F.R. § 240.10b-5 (1983); VA. CODE ANN. § 13.1-75(c) (1978); and N.C. GEN. STAT. § 55-113(b) (1981), are set forth verbatim in Exhibits D and E to the Petition.

STATEMENT OF THE CASE

The complaint in this action[1] for damages was filed by Respondent on October 14, 1981 in the United States District Court for the Eastern District of North Carolina. This action arises out of the merger and reorganization of Durham Hosiery occurring in December, 1980 - January, 1981.[2] Respondent's complaint alleged that Petitioners, who are the officers and directors of Durham Hosiery and a majority shareholder of the corporation,[3] issued misleading proxy materials as part of their efforts to effectuate

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[1]This action is but one of several cases presently pending in the federal courts arising out of the merger and reorganization of Durham Hosiery in December, 1980 - January, 1981. In *Lindner v. Durham Hosiery Mills, Inc.*, Civil Action No. 81-1087-CIV-5 (E.D.N.C.), on March 14, 1984 a jury returned a verdict in favor of Defendants on issues of breach of fiduciary duty and violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1976 & Supp. 1983). That verdict is presently on appeal to the Fourth Circuit Court of Appeals, No. 84-1593 (4th Cir.) (oral argument held Jan. 10, 1985). The *Lindner* appeal does not involve any issues having a direct bearing on this case. Two other actions brought by fellow dissenting shareholders of Respondent are presently pending in the United States District Court for the Middle District of North Carolina: *Umstead v. Durham Hosiery Mills, Inc.*, 592 F. Supp. 1269 (M.D.N.C. 1984) and 578 F. Supp. 342 (M.D.N.C. 1984); and *Teer v. Durham Hosiery Mills, Inc.*, Civil Action No. C-83-1310-D (M.D.N.C.).

[2]Respondent owned 800 shares of Class B non-voting stock in Durham Hosiery; 100 of those shares were held in "street name" by his broker. Respondent's holdings represented 1.13% of the 71,101 shares of Durham Hosiery stock then outstanding. Because Respondent's broker had tendered the 100 shares held in street name to the corporation in early 1981, 700 shares were at issue at trial.

[3]In December, 1980 Petitioner Cralle was the President and Treasurer of Durham Hosiery while Petitioner Schoenhut was the corporation's Vice President and Secretary. Petitioner Barnett acquired majority control of the corporation contemporaneous with the merger and reorganization. The remaining Petitioners were directors of the corporation.

a merger and reorganization of the corporation which would result in the "squeeze-out" of minority shareholders and subsequently engaged in a scheme or artifice to defraud Respondent of his state law appraisal rights.[4] After a seven-day trial, the jury hearing the action rendered a verdict for Respondent on September 15, 1983. The jury found that Petitioners had committed two (2) violations of SEC Rule 10b-5 and common law fraud and awarded compensatory damages of $25,900.00[5] and punitive damages of $50,000.00. On September 16, 1983 the trial court, Honorable James C. Fox, Judge Presiding, entered judgment based on the jury verdict. After Judge Fox denied Petitioners' post-verdict motions for judgment n.o.v. or for a new trial, Petitioners filed on October 13, 1983 a notice of appeal to the Fourth Circuit Court of Appeals.

While their appeal from the district court's judgment was pending in the Fourth Circuit, Petitioners filed in the district court on March 5, 1984 a motion to vacate judgment pursuant to FED. R. CIV. P. 60(b). On August 2, 1984 Judge Fox entered an Order denying Petitioners' motion because the district court lacked jurisdiction to act on it.

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[4]In his Complaint and Amended Complaint Respondent asserted causes of action for (1) breach of fiduciary duty; (2) violations of the North Carolina Securities Act, N.C. GEN. STAT. § 78A-1 *et seq.* (1981); (3) violations of the North Carolina Unfair Trade Practices Act, N.C. GEN. STAT. § 75-1.1 (1981); (4) violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. § 240.10b-5; and (5) common law fraud. All claims except those for violations of SEC Rule 10b-5 and common law fraud were dismissed by the trial court.

[5]On the verdict form, the jury entered a finding that White's 700 shares of Class B non-voting stock had a fair value of $37.00 per share.

In their appeal to the Fourth Circuit, Petitioners asserted numerous arguments in support of their contention that the district court's judgment should be reversed. [6] In a nine-page *per curiam* unpublished [7] decision issued on January 7, 1985 (Petition Appendix A) the Fourth Circuit (per Murnaghan, Sprouse and Michael, JJ.) affirmed the judgment entered by the district court. Petitioners' motion for rehearing was denied in an order issued by the Fourth Circuit on February 1, 1985 (Petition Appendix C). From these decisions Petitioners seek the review of this Court.

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[6]Petitioners contended in the Fourth Circuit that the trial court had erred in submitting the SEC Rule 10b-5 and common law fraud issues to the jury, that the trial court had erred in permitting Respondent's expert witness to testify regarding the fair value of the stock, that the trial court had erred in admitting into evidence post-merger (1981 and 1982) financial information to impeach the testimony of Durham Hosiery president Cralle and, finally, that the trial court had erred in denying Petitioners' Rule 60 motion.

[7]The decision of the panel below *not* to publish their opinion in this case is significant in light of Fourth Circuit Internal Operating Procedure 36.3, which states:

> *Publication of decisions.* Opinions delivered by the Court will be published only if the author or a majority of the joining judges believe the opinion satisfies one or more of the standards for publication:
>
> i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
>
> ii. It involves a legal issue of continuing public interest; or
>
> iii. It criticizes existing law; or
>
> iv. It contains an historical review of a legal rule that is not duplicative; or
>
> v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

STATEMENT OF FACTS

As noted above, this action arises out of the merger of Durham Hosiery, a North Carolina corporation, and DHM, Inc., a Virginia corporation, on January 15, 1981. Durham Hosiery had profitably operated three mills at different locations until the early 1970's when it allegedly suffered reverses because of the vagaries of the ladies' hosiery market. In the summer of 1980 it sold its Franklinton, North Carolina, plant to another manufacturer [8] thereby leaving it only with operations located in Danville, Virginia. Petitioner Barnett, a licensed attorney, investor and former Danville stockbroker, became interested in acquiring ownership and control of the remaining Danville facility. Without disclosing Barnett's identity (or any facts surrounding the sale of the Franklinton plant), Petitioner Cralle, Durham Hosiery's president, arranged for Barnett to purchase from two New York stockbrokers forty percent (40%) of the 71,101 outstanding shares of Durham Hosiery in the fall of 1980. Shortly thereafter, Barnett purchased from Petitioner Schoenhut,

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[8]The 1980 sale of the Franklinton mill was an operative event in this action. Durham Hosiery sold its Franklinton operations to another hosiery manufacturer for $1.055 million, a sum which enabled the corporation to retire almost all of its debt. In addition, the sale enabled Durham Hosiery to rid itself of an unprofitable Franklinton division which company president Cralle admitted had been a "substantial detriment" to the company's progress and financial performance. The sale of the Franklinton mill enabled Durham Hosiery to achieve earnings per share of $5.60 for 1980, which represented a dramatic improvement over the $0.40 per share earnings registered in 1979. In the proxy materials which Durham Hosiery mailed to its shareholders (including Respondent) on December 22, 1980, Petitioners did not disclose in clear terms the fact that the Franklinton plant had been sold five months earlier and did not disclose in *any* terms the salutary effect upon the company's fortunes which the sale had already had and which it could reasonably be expected to have in the foreseeable future.

an officer and director of Durham Hosiery, the latter's shares of stock on extremely favorable terms with Barnett agreeing that after the merger Schoenhut would receive deferred compensation of $500,000 for providing "consulting" services to the corporation. Cralle entered into an oral "gentlemen's agreement" with Barnett and received similar assurances in addition to an option to sell to Barnett his shares of Durham Hosiery. By the time of the merger, Barnett had accumulated a majority of the Durham Hosiery stock.

Petitioners Barnett and Cralle and their attorney, Frederick L. Russell of Charlottesville, Virginia, structured the merger and reorganization. Shareholders of Durham Hosiery would receive one share of DHM, Inc. for every 4,500 shares of Durham Hosiery which they held. DHM, Inc. was to have only sixteen (16) shares outstanding. [9] Holders of fewer than 4,500 Durham Hosiery shares had either to purchase sufficient shares to bring their total to 4,500 or to sell their shares at a price determined by bids received by the corporation from holders seeking more shares.

On December 22, 1980 Durham Hosiery mailed to its shareholders, including Respondent, a Proxy Statement and other documents containing descriptions of the proposed merger and reorganization, all of which were prepared by attorney Russell. Petitioner Cralle read the

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[9]Testimony at trial indicated that *prior* to the merger Durham Hosiery had nearly 300 shareholders. *After* the merger the only shareholders of DHM, Inc. are Petitioners Barnett (who owns 14 of 16 shares) and Cralle (who owns 1 share) and company executive Bruce Evans (who also owns 1 share).

documents[10] and signed the Proxy Statement. According to the Proxy Statement, shareholders objecting to the merger could dissent and seek appraisal of and payment for their shares from the corporation by complying with the "Virginia Stock Corporation Act (or the similar provision of North Carolina law)." The Proxy Statement described in detail the procedures to be followed by the shareholders in complying with the Virginia statute, but made no mention of the North Carolina dissenter's rights statute beyond this brief quoted parenthetical reference.

Respondent testified at trial that he received the proxy materials in late December, 1980 and thereafter consulted his North Carolina attorney. Respondent then notified Durham Hosiery by mail of his objection to the merger and his intention to dissent and seek the appraisal of the fair value of his stock. He enclosed his proxy with his letter, voting his shares against the merger. Petitioner Cralle informed Respondent by letter dated January 15, 1981 that over eighty percent (80%) of the shares of Durham Hosiery had been voted in favor of the merger at the January 12 shareholders' meeting. Durham Hosiery offered Respondent $7.00 per share for his stock or, alternatively, the rights of a dissenting shareholder under the Virginia Stock Corporation Act, a photocopy of which was enclosed with Cralle's letter. He was advised that he

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[10]One basis of Respondent's claims in the trial court was the misrepresentation and omission of material facts in the Proxy Statement. For example, the Proxy Materials contained no mention of the fact that Barnett had already acquired a majority of the outstanding stock, they omitted any information regarding the improved performance and financial condition of Durham Hosiery during 1980 (*see* note 8, *supra*), they failed to set forth any financial information from which a shareholder could calculate the earnings or profitability of the corporation and they omitted any mention of the Barnett-Schoenhut and Barnett-Cralle agreements. In addition, the Proxy Materials misrepresented the nature and terms of recent transactions in the company's stock.

was required to submit his shares for notation of dissent within the statutory time period. There was no reference in Cralle's letter to the law of North Carolina.

Respondent discussed his dissenters' rights under Virginia law with his North Carolina attorney and, on February 3, 1981, he sent his stock certificates to Durham Hosiery together with a letter requesting that notation of dissent be recorded on his certificates.[11] Durham Hosiery replied that, because the statutory time period for notation of dissent had expired on February 2, the request was not timely and therefore the shares were returned without notation. Durham Hosiery advised Respondent that he would be compensated for his shares from an escrow account created pursuant to the merger and reorganization. Another request for notation of Respondent's shares proved unavailing.

After obtaining Danville, Virginia, counsel Respondent, in accordance with the provisions of VA. CODE ANN. § 13.1-75(f) (1978), next filed a complaint in the Circuit Court of the City of Danville seeking an appraisal of the fair value of his stock under the Virginia dissenters' rights statute.[12] Durham Hosiery, by its attorney Russell, filed a motion to dismiss Respondent's action on the ground that North Carolina, not Virginia, law governed dissenter's

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[11]On page 16 of their Petition, Petitioners assert that Respondent "waited almost three weeks before returning his shares of stock to the corporation" but ignore the Fourth Circuit's finding (Petition, Exhibit A, page A-9, n.6) that Respondent delayed requesting notation until he had received on February 2, 1981 written confirmation from his broker regarding his Durham Hosiery shareholdings.

[12]The Virginia statute provides that if a dissenting shareholder and the corporation do not reach agreement as to the fair value of the dissenter's stock the corporation *must* file a bill in equity seeking a judicial determination value. Where (as here) the corporation neglects this statutory duty, the dissenting shareholders may file the appropriate action. VA. CODE ANN. § 13.1-75(f) (1978).

rights after the merger.[13] The Danville Circuit Court agreed that North Carolina law governed and on June 25, 1981 it granted Durham Hosiery's motion and ordered Respondent's suit dismissed for lack of subject matter jurisdiction. After being informed that his Danville dissenter's rights suit had been dismissed, Respondent filed this action in the United States District Court for the Eastern District of North Carolina.

Respondent testified at trial that he believed that his Danville suit had been dismissed because of correspondence which he had received after the June 25, 1981 hearing. On June 26, 1981 Respondent's Danville attorney (Robert T. Vaughan, Jr.) wrote to Respondent informing him that the action had been dismissed; on August 11, 1981 Durham Hoisery attorney Russell wrote a similar letter to Respondent. Russell wrote in his letter that he (Russell) had "participated and heard the judge's remarks

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[13]The basis of Durham Hosiery's argument was an order entered by Judge Michael of the United States District Court for the Western District of Virginia in an action for injunctive relief brought by a Durham Hosiery shareholder seeking to block the proposed merger. *Lindner Fund v. Durham Hosiery Mills, Inc.*, Civil Action No. 81-004(C) (W.D. Va. Jan. 27, 1981). In the course of dismissing that minority shareholder's suit for injunction, Judge Michael expressly ruled that North Carolina law, specifically the North Carolina statutory provisions on minority stockholder rights, applied to the Durham Hosiery merger.

Notwithstanding the fact that only 14 shareholders had dissented from the merger, Durham Hosiery never took *any* steps to inform them of Judge Michael's decision.

On page 18 of their Petition, Petitioners assert that Durham Hosiery sought dismissal of Respondent's Danville dissenter's rights suit on the ground that the submission of his shares had been untimely. This piece of revisionist history may best be answered by quoting the Fourth Circuit's decision: "Durham [Hosiery], by its attorney Russell, filed a motion to dismiss [Respondent's] action, on the ground that North Carolina, not Virginia, law governed dissenter's rights after the merger" (Petition, Appendix A, page A-10) (footnote omitted).

at the June 25, 1981 hearing in the Danville Circuit Court *which ordered dismissal of your Virginia suit for dissenter's rights"* (emphasis added). In point of fact, neither Respondent's Danville attorney nor Durham Hosiery attorney Russell had ever presented a formal order of dismissal to Durham Circuit Court Judge James F. Ingram for entry.

On February 7, 1984 (that is, five months after the jury in the district court had reached its verdict in this action) the Clerk of the Danville Circuit Court sent out notices informing both Respondent and Durham Hosiery that unless action of some sort was taken the dissenter's rights suit would be discontinued.[14] It has never been disputed that this was the *first* notice Respondent received that his Danville dissenter's rights suit had not been formally "dismissed" in 1981. The notice mailed to the parties by the Clerk of the Danville Circuit Court formed the basis of Petitioners' Rule 60 motion in the district court.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT COURT OF APPEALS DID NOT ERR IN AFFIRMING THE JURY'S VERDICT (AND A JUDGMENT ENTERED THEREON) FINDING THAT PETITIONERS HAD ENGAGED IN A SCHEME OR ARTIFICE TO DEFRAUD RESPONDENT OF HIS DISSENTER'S RIGHTS.

In Part I of the corresponding section of the Petition (pages 19-25), Petitioners contend that the Fourth Circuit erred in denying their post-verdict Rule 60 motion. In response, Respondent would first direct this Court's attention to the Fourth Circuit's discussion of this issue as a clear indication that the court below correctly decided the issue:

[14] *See* VA. CODE ANN. § 8.01-335 (1979).

> Finally, the appellants urge that the district court erred in denying their Rule 60(b) motion. After the district court trial, the parties discovered that the Danville Circuit Court had failed to enter a final order dismissing White's action in that court, apparently due to counsel's oversight. The Danville court concluded in 1981 that it lacked subject matter jurisdiction and orally ordered the case dismissed, but a dismissal order was never presented by counsel.
>
> *We agreed with White that the Virginia action appears to have effectively terminated in every sense short of formal final order, but that in any event the verdict of the federal district court jury was not grounded on the outcome of the Virginia case. The basis of the federal jury verdict was appellants' conduct in misleading White concerning his right to pursue his appraisal action. This misrepresentation, without regard to the actual termination of the Virginia action, supplied a sufficient basis for compensatory and punitive damages under Rule 10b-5 and common law fraud.*

(Petition, Appendix A, pages A-18 to A-20) (emphasis added).

As noted above, in February, 1984 the parties apparently learned for the first time[15] that the Danville proceeding had never been *formally* dismissed. Rather than immediately investigating the status of the case in Danville,

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[15]As noted above, it is not disputed that Respondent reasonably believed that his Danville dissenter's rights suit had been dismissed in June, 1981. The same cannot be said of Petitioners; Durham Hosiery attorney Russell, who was counsel of record in the Danville proceeding, clearly knew that that action had never been formally dismissed but he chose not to relate that fact during his extensive testimony at trial in the district court.

Petitioners did nothing. It was due to *Respondent's* efforts that a hearing was held before the Danville court on August 9, 1984 in order that the status of the case might be clarified.[16] After that hearing, Judge Ingram, at the insistence of Petitioners, entered an order (Petition Exhibit B) on October 1, 1984 stating that Respondent's Danville dissenter's rights suit was still viable. Judge Ingram's order was entered over the strenuous objection of Respondent's attorney[17] (Petition, Exhibit B, page B-5) and the validity of that order must be severely questioned; in ruling that the dissenter's rights action was viable and that the dispute was governed by Virginia law, the Danville court ignored the fact (as argued by counsel for Respondent) that *every* federal district court which has considered the question had clearly held that *North*

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[16]Petitioners' failure between February and August, 1984 to take *any* action to resolve or even investigate the status of the Danville action strongly indicates that they did not act with the requisite "due diligence" to justify granting relief under Rule 60. *See, e.g., Kansas City Area Transportation Authority v. State of Missouri,* 640 F.2d 173, 175 (8th Cir. 1981); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.,* 549 F.2d 368, 391 (5th Cir. 1977). *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2859 at 182-84 (1973).

[17]On page 24 of their Petition, Petitioners assert that Respondent was "pursuing an appraisal action for the fair value of his stock at [sic] the State Courts of Virginia at the time of this trial." This statement is a falsehood. After his dissenter's rights suit was dismissed upon Durham Hosiery's motion in June, 1981 Respondent filed his federal court action and pursued his legal remedies in that forum *only*.

Carolina law applies to actions arising out of the merger and reorganization of Durham Hosiery.[18]

Petitioners attempted to rewrite history by including a copy of Judge Ingram's October 1, 1984 order in the record on appeal to the Fourth Circuit. Petitioners first attempted to do so in the district court by filing a motion to supplement the record on appeal under the provisions of FED. R. APP. P. 10(e). On October 18, 1984 Judge Fox entered an order denying Petitioners' motion. The reasoning of the district court is equally applicable here:

> Defendants clearly seek to use Rule 10(e) to introduce new evidence in their pending appeal. A grant of defendants' motion would allow into the record on appeal evidence which does not simply correct the actual trial record, but rather seeks to correct the historical record. The discussion with Judge Ingram and his subsequent order of October 2, 1984, were not matters which occurred in this court in the course of the trial proceedings leading

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[18] *Lindner Fund v. Durham Hosiery Mills, Inc.*, Civil Action No. 81-0004(C) (W.D. Va. Jan. 27, 1981); *White v. Durham Hosiery Mills, Inc.*, Civil Action No. 81-912-CIV-5 (E.D.N.C. Jan. 25, 1983); *Lindner v. Durham Hosiery Mills, Inc.*, Civil Action No. 81-1087-CIV-5 (E.D.N.C. Jan. 25, 1983); *Teer v. Durham Hosiery Mills, Inc.*, Civil Action No. C-83-1310-D (M.D.N.C. March 8, 1984); *Umstead v. Durham Hosiery Mills, Inc.*, 578 F. Supp. 342, 345 (M.D.N.C. 1984). It should be noted that after having Respondent's Danville dissenter's rights suit dismissed by contending that North Carolina law governed, Petitioners next attempted to have this action dismissed by contending that *Virginia* law controlled. Judge Fox thwarted Petitioners' effort by ruling that the doctrine of judicial estoppel precluded such litigational chicanery. Not to be deterred, Petitioners unsuccessfully advanced the same spurious contention in the *Teer* and *Umstead* actions (*see* note 1, *supra*) in the Middle District of North Carolina; Chief Judge Ward there also found judicial estoppel to be applicable.

to entry of judgment on September 16, 1983. In addition, these matters did not affect this court's decision to deny defendants' motion for relief from judgment, which was decided strictly on jurisdictional grounds. Therefore, since defendant's motion, affidavits and annexed exhibits do not constitute evidence presented to the district court in a timely fashion, defendants may not now add these documents to the record on appeal.[1]

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[1] Although not decisive, the court finds it necessary to note that defendants' claim of surprise regarding the status of plaintiff's state appraisal action is somewhat tenuous. A reasonable pre-trial investigation by defendants, as occurred post-trial, would have uncovered the fact that a written order of dismissal had not been entered in Judge Ingram's court. In addition, the court finds little equity on the side of the defendants, whose position regarding plaintiff's state appraisal rights in Virginia has constantly vacillated depending on the courtroom in which the issue was being heard and the position which best suited defendants' contentions in that given setting. The court has not lost sight of the fact that defendants originally fought plaintiff when he attempted to pursue his dissenter's rights in Virginia. Now, with a substantial verdict pending against them, defendants are all too eager to allow plaintiff to pursue his state action in the Virginia courts. Thus, neither legal nor equitable principles support a grant of defendants' motion.

White v. Durham Hosiery Mills, Inc., Civil Action No. 81-912-CIV-5 (E.D.N.C. Oct. 18, 1984). Petitioners reasserted this argument in the Fourth Circuit on three (3) occasions: on October 23, 1984 they filed a motion to supplement the record on appeal in the Fourth circuit; on October 31,

1984 Petitioners raised the issue at oral argument before that court; finally, on January 21, 1985 they asserted this argument in their petition for rehearing to the Fourth Circuit. In *each* instance the court below found Petitioners' arguments to be unavailing.

In their Petition (pages 22-24), Petitioners seemingly argue that because their scheme or artifice to defraud Respondent of his dissenter's rights was ultimately unsuccessful (because, in their view, the Danville dissenter's rights action was a viable alternative) Respondent's recovery should not have been permitted to stand. As the Fourth Circuit succinctly stated, the success or failure of Petitioners' scheme was immaterial to the jury's verdict:

> We agreed with White that the Virginia action appears to have effectively terminated in every sense short of formal final order, but that in any event the verdict of the federal district court jury was not grounded on the outcome of the Virginia case. The basis of the federal jury verdict was appellants' conduct in misleading White concerning his right to pursue his appraisal action. This misrepresentation, without regard to the actual termination of the Virginia action, supplied a sufficient basis for compensatory and punitive damages under Rule 10b-5 and common law fraud.

(Petition, Appendix A, pages A-19 to A-20).

In conclusion, Respondent submits that this case does not merit granting the Petition for Writ of Certiorari because (1) the Fourth Circuit fully considered (on *several* occasions) and correctly decided the issue raised here; (2) Petitioners' argument is without merit; and (3) the issue presented by Petitioners will not have application outside the narrow and unusual facts of this case; in their Petition, Petitioners do not even assert that the resolution of this case would affect *anyone* other than the parties involved.

II. THE COURTS BELOW DID NOT ERR IN UPHOLDING THE JURY VERDICT BECAUSE (1) RESPONDENT'S APPRAISAL RIGHT IS NOT THE EXCLUSIVE REMEDY AND (2) THE RESULT REACHED BY THE COURTS BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *SANTA FE INDUSTRIES, INC. v. GREEN,* 430 U.S. 462, 97 S.CT. 1292, 51 L.ED.2d 480 (1977).

In Part II of this section of their Petition (pages 25-28), Petitioners attempt to create an issue worthy of this Court's review by contending that the decisions of the courts below conflict with those of this Court in *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d. 480 (1977), and the Supreme Court of Virginia in *Adams v. United States Distributing Corp.,* 184 Va. 134, 34 S.E.2d 244 (1945), *cert. denied,* 327 U.S. 788, 66 S.Ct. 807, 90 L.Ed. 1014 (1946). Both contentions are without merit.[19]

In *Santa Fe* this Court concluded as an alternate ground for its holding that SEC Rule 10b-5 did not encompass claims of minority shareholders opposed to a merger where there were *no* allegations of material misrepresentations or material failures to disclose. *Santa Fe,* 430 U.S. at 474, 97 S.Ct. at 1301, 51 L.Ed.2d at 492.[20] The federal

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[19]Interestingly, Petitioners did not assert these contentions in the Fourth Circuit.

[20]As this Court, per Justice White, there stated in pertinent part:

> As we have indicated, the case comes to us on the premise that the complaint failed to allege a material misrepresentation or material failure to disclose. The finding of the District Court, undisturbed by the Court of Appeals, was that there was no "omission" or "misstatement" in the information statement accompanying the notice of merger.

Santa Fe, 430 U.S. at 474, 97 S.Ct. at 1301, 51 L.Ed.2d at 492.

circuit courts have interpreted *Santa Fe* as precluding application of Rule 10b-5 *only* if the breach of fiduciary duty does not involve misrepresentations or nondisclosures. *See, e.g., Brown v. Ivie,* 661 F.2d 62, 66-67 (5th Cir. 1981), *cert. denied,* 455 U.S. 990, 102 S.Ct. 1614, 71 L.Ed.2d 850 (1982); *Panter v. Marshall Field & Co.,* 646 F.2d 271, 288 (7th Cir. 1981); *Croy v. Campbell,* 624 F.2d 709, 716 n.7 (5th Cir. 1980); *Healey v. Catalyst Recovery of Pennsylvania,* 616 F.2d 641, 646-47 (3d Cir. 1980); *Nash v. Farmers New World Life Ins. Co.,* 570 F.2d 558, 562 (6th Cir.), *cert. denied,* 439 U.S. 822, 99 S.Ct. 89, 58 L.Ed.2d 114 (1978); *Goldberg v. Meridor,* 567 F.2d 209, 218-19 (2d Cir. 1977), *cert. denied,* 434 U.S. 1069, 98 S.Ct. 1249, 55 L.Ed.2d 771 (1978). As the Fifth Circuit stated in *Brown v. Ivie,* where it was held that in issuing a buy-out arrangement in a closely held corporation the directors could be held liable under Rule 10b-5 because they failed to disclose their true motive[21] in carrying out the transaction:

> Brown has averred the requisite nondisclosures and misrepresentations necessary to overcome the hurdles presented by *Santa Fe.* The complaint contains affirmative allegations that the defendants fraudulently misrepresented that the purpose of the 1979 agreement was to alter the insurance provisions and provide increased compensation in the event of a shareholder's death or disability, and that the defendants fraudulently omitted to inform Brown that they sought the agreement in order to obtain his stock at less than fair value. Because of the presence of these allegations of fraud, Brown's claim is not beyond the scope of Rule 10b-5.

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[21]In *Brown* the directors' averred motive for the transaction was to be able to obtain certain insurance coverage; their actual motive was to oust plaintiff as a shareholder. *Brown,* 661 F.2d at 64.

Brown, 661 F.2d at 66-67. Similarly, in the present case Respondent alleged that Petitioners had engaged in misrepresentations and omissions of material facts in the proxy materials. These allegations bring this case within the rule established in the cases cited above. *See generally* Hazen, *Breaches of Fiduciary Duty and the Federal Securities Laws*, 61 N.C.L.REV. 527, 532-33 (1983).

Petitioners' contention that the decision of the Supreme Court of Virginia[22] in *Adams v. United States Distributing Corp.* dictates that Respondent's action should have been dismissed is similarly misplaced. In *Adams* the Virginia court concluded that "unless the corporate merger be tainted with fraud or illegality—and there is no such allegation in the case at bar—the dissenting stockholder must pursue the remedy prescribed by the appraisal statute." *Adams*, 184 Va. at 147, 34 S.E.2d at 250. In the present case Respondent alleged—and the jury found—that the merger and reorganization of Durham Hosiery was riddled with fraud, hence, even under the decision in *Adams* Respondent's Danville dissenter's rights action was not his exclusive remedy. *See generally* Macrae, *Dissenting Stockholders' Rights in Virginia*, 12 U.RICH.L.REV. 505, 516-17 (1978).

Therefore, Respondent submits that the arguments advanced by Petitioners in Part II of their Petition do not merit granting the Petition.

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[22]As noted above (*see* note 18), *five* federal district courts have held that North Carolina law applies to actions arising out of the merger and reorganization of Durham Hosiery. Petitioners' contention herein that Virginia law applies (and that, therefore, the *Adams* decision dictates that the appraisal action is Respondent's exclusive remedy) ignores this weight of precedent.

It is well settled under North Carolina law that appraisal rights are *not* the exclusive remedy available to dissenting shareholders. *See* N.C. GEN. STAT. § 55-113(a)(2), (b) (1981); *Umstead v. Durham Hosiery Mills, Inc.*, 578 F. Supp. 342, 345 (M.D.N.C. 1984).

CONCLUSION

For the reasons stated above, a writ of certiorari should be denied. Respondent respectfully requests an award of his attorney's fees and costs expended herein under the provisions of SUP.CT.R. 49.2 on the ground that the Petition for Writ of Certiorari is frivolous.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and accurate copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served upon counsel of record for Petitioners listed below by first-class mail, postage prepaid, in accordance with the provisions of SUP. CT. R. 28.3, this the 1st day of May, 1985.

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